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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. _____

LAWRENCE A. RIDGEWAY, PETITIONER

v.

STATE OF OHIO, RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Respondent respectfully prays that a writ of certiorari not issue to review the judgment of the Supreme Court of Ohio entered in the above captioned matter on June 29, 1972.

OPINIONS BELOW

The Supreme Court of Ohio rendered no opinion.

The opinions of the Court of Appeals, Second Judicial District, Montgomery County, Ohio, are unreported and are appended hereto.

JUDGEMENTS BELOW

On June 9, 1972, the Supreme Court of the State of Ohio overruled Petitioner's Motion For Leave To Appeal From The Court of Appeals, Second Judicial District, Montgomery County, Ohio.

On June 29, 1972, Petitioner's Motion to the Supreme Court of Ohio for rehearing was denied.

JURISDICTION

The Petitioner invokes the jurisdiction of this Court under Title 28 U.S.C.A., Section 1257 (3) alleging violation of certain rights secured by the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT XIV, Section 1: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

OHIO REVISED CODE, SECTION 2321.07
DUTY OF TRIAL JUDGE
The trial judge, upon the receipt of a bill of exceptions, shall indorse thereon the date it was received, and within five days thereafter correct it, if necessary, allow and sign such bill, and immediately transmit it to the office of the clerk of the court from whom it was received, with any amendment or objections thereto.

OHIO REVISED CODE, SECTION 2945.75
JURY TO SET VALUE IN VERDICT
When an indictment or information charges an offense against property by larceny, receiving stolen property, embezzlement, wrongful conversion of property, or ob-

taining property by false pretenses, if the value thereof determines the degree of the offense or the punishment, the jury on conviction shall ascertain and declare in their verdict the value of such property.

QUESTIONS PRESENTED

(1) Whether there has been a denial of due process and equal protection of the law within the meaning of the Fourteenth Amendment to the United States Constitution, where in a criminal prosecution for Grand Larceny and due to circumstances beyond the control of the Trial Court, the Petitioner is furnished with an incomplete transcript of the trial proceedings?

(2) Whether the Petitioner has been deprived of his liberty without due process of law within the meaning of the Fourteenth Amendment to the United States Constitution where in a criminal prosecution under an indictment for Grand Larceny the jury returns a verdict of guilty without assigning an exact monetary value to the stolen property?

STATEMENT OF THE CASE

On June 25, 1969, the petitioner was indicted for one count of Grand Larceny by the Grand Jury of Montgomery County, Ohio. On August 25, 1969, a jury trial was commenced and on August 29, 1969, the jury found the defendant guilty of Grand Larceny. On September 5, 1969, judgment of conviction was entered against petitioner. During the course of the trial, petitioner acted as his own counsel.

Following his conviction, petitioner obtained counsel to prosecute his appeal. On September 29, 1969, after properly perfecting petitioner's appeal, counsel requested a full and complete transcript of the trial. This request was denied by the Court for the reason that petitioner failed to prepay the printing cost. Three days there-

after, October 2, 1969, petitioner filed a motion to proceed in forma pauperis, but the trial court refused to grant a hearing on the motion. This ruling was appealed by petitioner and on June 5, 1970, the Court of Appeals reversed the Trial Court and remanded the case. Subsequently, the Trial Court allowed the printing of the transcript upon the basis that petitioner was indigent.

On October 28, 1970, the Trial Court by journal entry stated that one of the Court reporters who had made stenographic notes of a portion of the proceedings could not be located.

The Court subsequently ordered the incomplete transcript filed. Petitioner filed an objection to the incomplete transcript, which objection was overruled by the Trial Court. The Trial Court acknowledged that a narrative transcript could not be prepared due to the fact that appeal counsel was not at the tirial.

From the judgment of conviction and sentence to the Ohio Penitentiary, petitioner appealed and the Court of Appeals and the Ohio Supreme Court affirmed the conviction. Petitioner has been free on bond pending his appeal. On June 29, 1972, the Supreme Court of Ohio overruled petitioner's motion for rehearing.

ARGUMENT I

AN INCOMPLETE BILL OF EXCEPTIONS, EVEN THOUGH OBJECTED TO BY THE PETITIONER, DID NOT DENY HIM HIS RIGHT TO A FULL AND EFFECTIVE APPEAL UNDER THE LAWS OF THE STATE OF OHIO.

It is mandatory that the Trial Judge correct errors in the Bill of Exceptions. *Revised Code § 2321.07; State ex rel. Eges vs. Corlett, 137 Ohio St. 19, 27 N. E. (2d) 930 (1940).* The missing portion of testimony in this case consisted of approximately one hour of cross-examination by Mr. Ridgeway of Detective Larry J. Ballard, formerly

of the Wayne-Township Police Department in Montgomery County, Ohio. The Lower Court has done everything within its power to assemble this testimony which was recorded by a relief stenographer. All efforts to locate the reporter, or her notes, were in vain. There was no attempt to reconstruct a narrative report of the absent testimony, apparently, because the Defendant chose to defend himself. In view of this and of the fact that this dialogue was but a small and seemingly insignificant facet of the nearly six hundred pages of recorded testimony, the Trial Court had no other alternative but to deliver the transcript as it existed, minus that segment taken after 4:00 p. m. on the day in question.

Petitioner has made no allegations that what might have been contained in that missing testimony was so elemental to his case that its absence in the transcript has unduly and unfairly prejudiced him. Absent such argument, it can only be assumed that the testimony was unimportant and had no bearing upon his conviction of grand larceny. The error, if any, cannot be remedied. To remand this case for a new trial, merely because of the lack of sixty minutes testimony of unproven and questionable significance would be a waste of the Court's time and money. To reverse Petitioner's conviction would not be in the interest of substantial justice.

Very much on point was the case of *Searles vs. Cowdrick, 21 O.C.C.N.S., 378, 35 O.C.C. 224, Aff'd. without OP 91 Ohio St. 371, 110 N.E. 1067 (1912),* in which the defeated party was unable to obtain any transcript of the trial because of the death of the stenographer. In holding that such unfortunate circumstance would not justify a reversal of the verdict, the Court reasoned that the judgment rendered in the Common Pleas Court is presumed "to be regular and valid and must stand unless reversed in some method authorized by law." The duty and burden reducing the trial to a written Bill of Ex-

ceptions must fall upon the party excepting, not the Court reporter. In the *Searles case*, the Court had to dismiss the appeal and rely upon the conviction below because it had no record at all upon which to review the evidence. In the instant case, however, the record is, for all intent and purposes, complete, and may justifiably be relied upon in an appeal of the Petitioner's conviction.

ARGUMENT II

IN A CRIMINAL PROSECUTION FOR GRAND LARCENY, A JURY VERDICT OF GUILTY ABSENT A DECLARATION OF THE VALUE OF THE STOLEN PROPERTY DID NOT DEPRIVE THE PETITIONER OF HIS LIBERTY WITHOUT DUE PROCESS OF LAW WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Petitioner argues that when an indictment charges a defendant with "grand larceny" and the jury finds the defendant guilty of "grand larceny", such verdict deprives the defendant of his liberty without due process of law under the Fourteenth Amendment, unless the jury also ascertains the exact fair market value of the property alleged to have been stolen. The Petitioner relies upon Revised Code § 2945.75, which requires the jury to determine the value of the goods stolen in order to fix the punishment. But the Petitioner has failed to read the statute closely. It states in pertinent part:

> "When an indictment or information charges an offense against property by *larceny* . . . *if* the value thereof determines the degree of the offense or the punishment, the jury, on conviction shall ascertain and declare in their verdict, the value of such property." (emphasis added).

It must be pointed out that in this case, the indictment

charged the Petitioner with "*grand* larceny" (emphasis added), not mere "larceny". The term, 'grand larceny', itself, specifies the degree of the crime and with it the proper punishment. The degree of punishment turns not upon the exact monetary value of the property, but only upon whether the value of the property is less than or greater than Sixty ($60.00) Dollars.

The Petitioner relies upon the case of *State v. Park, 174 Ohio St. 81, 186 N. E. 2d 736,* for its declaration that there is no such crime as "grand larceny" in Ohio and that if the jury fails to return a dollar value for the property stolen, the judgment cannot stand. Yet, a careful reading of *State vs. Park,* discloses no such statement. In fact, what *State vs. Park* did say, at page 83 of the opinion, was:

> "The terms 'grand larceny' and 'petit larceny' are not defined by statute in Ohio but are descriptive of common law offenses and are so generally used by Courts and the public to designate the degrees of the offense of larceny, that a Court will take judicial notice of their meaning."

Therefore, it is not true that there is no such crime as grand larceny in Ohio, only that such crime is not defined by statute in Ohio. Lack of statutory definition is not tantamount to an absence of the crime altogether. It means only that the specific term is so commonly used as to be a proper subject of judicial notice. It must be presumed therefore that the Trial Court realized that an indictment for grand larceny meant that the goods alleged stolen were worth more than Sixty ($60.00) Dollars.

By specifically finding the value of the things illegally obtained to be in excess of sixty ($60.00) dollars, the jury fulfilled their statutory duty. Any further detailed finding of market value at the time and place of taking would be inexact, superfluous, and place an unnecessary and heavy burden on the trial process.

It should be noted that no objection was raised in the Trial Court to the form of the verdict as it was submitted to the jury. It is a general rule of Appellant Review in Ohio that an Appellate Court will not consider an alleged error which the complaining party could have called to the attention of the Trial Court at a time when any such error could be avoided or remedied. As stated in *State v. Niel, 115 App. 366, 20 O. O. (2d) 445, 185 N E (2d) 462 at 465, (1961)* "The Defendant could have asked to have the jury make more specific finding, but instead of doing so acquiesced on the forms of verdict submitted and on the form of verdict returned".

This absence of a request by the Petitioner for a more specific finding is especially relevant when it does not affirmatively appear from the record that such technical mistake prejudicially affected the merits of the case and the substantial rights of one or both parties.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should not be granted.

Respectfully submitted,
LEE C. FALKE,
Prosecuting Attorney of
Montgomery County, Ohio
41 N. Perry St., Suite 308
Dayton, Ohio 45402

By: JAMES A. BROGRAN,
First Assistant
and
NICHOLAS L. GERREN, JR.
Legal Assistant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Brief in Opposition To Petition For Writ Of Certiorari To The Supreme Court Of Ohio, was deposited in the United States mails with sufficient postage affixed, addressed to Mr. William J. Abraham and Mr. Robert E. Cesner, Jr., Attorneys-At-Law, 24 North High Street, Columbus, Ohio 43215, Counsel for Petitioner, on this 21st day of December, 1972.

LEE C. FALKE,
Prosecuting Attorney of
Montgomery County, Ohio

By
JAMES A. BROGAN,
First Assistant
Counsel for Respondent.

Appendix No. 1

(Filed June 25, 1969)

THE STATE OF OHIO, MONTGOMERY COUNTY
THE COURT OF COMMON PLEAS
Terms in the year Nineteen Hundred and Sixty-Nine

MONTGOMERY COUNTY, ss.

THE GRAND JURORS of the County of Montgomery, in the name, and by authority of the State of Ohio, on their oaths do present and find that Lawrence A. Ridgeway, on or about the 29th day of March, in the year one thousand nine hundred and sixty-nine, in the County of Montgomery, aforesaid, and State of Ohio, did steal from William Frambes, property, (2) Turbo Power Lawn Mowers and (2) MTD 4 horse power Rotary Tillers, in an amount and value in excess of Sixty Dollars ($60.00); contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

LEE C. FALKE,
Prosecuting Attorney of
Montgomery County, Ohio

Appendix No. 2

(Filed October 2, 1969)

MONTGOMERY COUNTY COMMON PLEAS COURT

STATE OF OHIO

Case No. 29253

Plaintiff,

Against

LAWRENCE A. RIDGEWAY

Defendant.

VERDICT

We, the Jury, upon the issues joined in this case, do find the defendant, Lawrence A. Ridgeway, (*) guilty of grand larceny.

(*) INSERT IN INK your verdict by writing "guilty" or "not guilty"

1 ORVILLE L. TYSSELING, Foreman
2 IAN L. LEYBOURNE
3 FRANK MORGAN
4 ROBERT C. MOORE
5 RAYMOND SHACKLEFORD
6 CHARLES M. KELLY
7 RICKIE G. ROBERTS
8 LESTER E. HARGIS
9 MARY GURGACZ
10 NORMADEAN MURPHY
11 ALLAN HUFF
12 JOSEPHINE R. ROBINSON

All Jurors concurring in the Verdict

Appendix No. 3

Filed October 2, 1969

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

Case No. 29253

STATE OF OHIO

Plaintiff,

vs.

LAWARENCE A. RIDGEWAY

Defendant.

DECISION AND ENTRY

On motion of defendant filed October 2, 1969 to obtain leave to proceed in forma pauperis:

The motion is overruled.

It must be noted that the motion reports that a notice of appeal has been filed. This court has no jurisdiction to determine the forms of appeal, as indigent or otherwise, in another court.

The defendant was found not to be indigent at the time of trial. The defendant repeatedly protested that he had funds available and could employ counsel if he chose to do so. He again stated on voir dire to the jury that it was his decision to represent himself as a matter of right.

It was also reported to this court by his recently employed counsel that he had been employed and paid by the defendant for this appeal.

LEE FALKE, *Prosecutor*
W. J. ABRAHAM, *Atty. for Defendant*

ROBERT L. MCBRIDE, Judge

Appendix No. 4

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

Case No. 3507

STATE OF OHIO,
Plaintiff-Appellee,

vs.

LAWRENCE A. RIDGEWAY,
Defendant-Appellant.

ENTRY

This cause came on to be heard upon an appeal from an order of The Common Pleas Court of Montgomery County, entered on the 8th day of October, 1969, wherein the Court held that it had no jurisdiction to consider and grant a motion of defendant in a criminal case to permit him to proceed as an indigent due to the fact that he is unable to prepay the costs for preparing a bill of exceptions after the defendant had filed his notice of appeal to the Court of Appeals.

Upon consideration of Appellant's assignment of error, brief and argument of Counsel, it is the opinion of the Court that the order of the Common Pleas Court should be reversed.

It is therefore, hereby ordered that the judgment of the Montgomery County Common Pleas Court be reversed and this matter remanded for further proceedings in accordance with law.

Kerns, P. J.
Crawford, J.
Sherer, J.

APPROVED:
William J. Abraham
Attorney for Defendant-Appellant,
Lee C. Falke, Prosecuting Attorney
James A. Brogan, Assistant
Attorneys for Plaintiff-Appellee.

Appendix No. 5

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO.

Case No. 3507

STATE OF OHIO,
Plaintiff-Appellee,

vs.

LAWRENCE A. RIDGEWAY,
Defendant-Appellant.

OPINION

Rendered on the 24th day of February, 1972.

LEE C. FALKE, Prosecuting Attorney, 41 North Perry Street, Dayton, Ohio 45402, by: James A. Brogan, Assistant Prosecuting Attorney and Kathryn G. Havermann, Legal Assistant
Attorneys for Plaintiff-Appellee

WILLIAM J. ABRAHAM and ROBERT E. CESNER, JR., 16 East Broad Street, Columbus, Ohio 43215
Attorneys for Defendant-Appellant

CRAWFORD, J.:

Defendant was convicted and sentenced on September 5, 1969 upon an indictment which, as amended, charged that he "did steal from Dixie Enterprises, Incorporated property, (2) Turbo Power Lawn Mowers and (2) MTD 4 horse power Rotary Tillers, in an amount and value in excess of Sixty Dollars ($60.00); etc."

According to the State's evidence, defendant had contrived with a stockboy and a cashier of Goldman's

Store No. 7 in Huber Heights, to obtain, without paying or being charged therefor, certain merchandise, including that described in the indictment, which he hauled away in a truck and kept or concealed.

Although not indigent, he chose to represent himself at the trial. Counsel employed by him now prosecute this appeal.

His first assignment of error is that "Where a jury returns a verdict of 'guilty of grand larceny' and no value of the property stolen is declared, such verdict will not form the predicate for a judgment."

The verdict reads:

> "We, the Jury, upon the issues joined in this case, do find the defendant, Lawrence A. Ridgeway, guilty of grand larceny."

This verdict is partly typed upon a printed form, with a blank space in which the word "guilty" is written by the jury in pen and ink.

Sec. 2945.75 R.C. provides that in the trial of a charge of larceny, if the value of the property stolen determines the degree of the offense or the punishment, the jury, on conviction, shall ascertain and declare in their verdict the value of such property.

Although the term "Grand Larceny" is not found in the statutes, the court in his charge defined the term as generally understood, explaining that it means the larceny of property of such value as to constitute a felony, which in this state is in excess of $60.00. The evidence clearly shows the value of the property stolen in this case to have exceeded that amount.

No objection was made either to the form of the verdict or to the instructions of the court.

The verdict in this form is technically incorrect, and its use is not approved. However, the defendant-appellant has not shown that he was in anywise prejudiced by this irregularity. His complaint is effectively answered by the Supreme Court in the case of *State vs. Park*, 174 Ohio St. 81, 186 N. E. (2d) 736 (1962).

The only perceptible distinction between that case and the present is of no significance: There the defendant's counsel admitted that the property allegedly stolen was of the value of Three Hundred Dollars ($300.00); here, although there is no such admission, the evidence is quite clear that the value was substantially in excess of Sixty Dollars ($60.00).

This assignment discloses no prejudicial error.

The second assignment is that the transcript or bill of exceptions is incomplete. Present counsel filed objections to the bill of exceptions as presented to the court, on the basis that it was incomplete for lack of a certain portion of the trial, during which a special temporary reporter was taking the record. In making the objection, defendant's counsel stated:

> "The likelihood (sic) of a prejudice to defendant's right of review on appeal is particularly clear in this case where, defendant represented himself during the trial and counsel has no means of determining what transpired during that portion of the trial which does not appear in the bill of exceptions. The defendant and his counsel in this case has done everything required by law to obtain a complete bill of exceptions, and defendant should not suffer detriment because of the failure of the court reporter to provide a portion of the transcript."

The objections were overruled in an entry which recited that a portion of the testimony was taken on a

single day after 4:00 o'clock P.M. by a special reporter, who, through illness, etc. has since been unavailable.

The entry also stated: "In view of the self representation no efforts have been made to supply a narrative report of the missing testimony.

"The trial court has no alternative other than to deliver the record as it exists with all of the testimony except that portion taken after 4:00 P.M. on the single day in question."

We agree that the trial court could not properly have taken any other course.

The burden of preparing such record as will portray his claimed errors is always upon the appellant. A narrative bill of exceptions when necessary to this end is permissible. 3 Ohio Juris. (2d) 344, Appellate Review, Section 432. There is no reason why such a method could not be used to supplement this transcript or bill of exceptions. It is no excuse that defendant was without counsel. This was by his own choice. He did not claim to be indigent nor request the appointment of counsel. If he cannot recall the substance of what was omitted, its importance to his defense would appear to be questionable, and he is not in a position to claim prejudice by its omission.

A trial in which one side proceeds without counsel always presents great difficulties to the court and to opposing counsel. In this case the trial court exhibited commendable patience, and he and opposing counsel showed all proper consideration for defendant's rights in an exhaustive trial which generated a record which already runs to 556 pages.

The third assignment is that the verdict is contrary to the manifest weight of the evidence. Although it is desirable that there be a complete transcript or bill of

exceptions for the consideration of such an assignment, the nature of the argument here presented is such as to reduce the importance of an absolutely complete record. The evidence presented leaves no doubt that defendant did wrongfully steal and carry away the property alleged in the indictment.

The argument under this assignment is that inasmuch as he operated with the connivance of persons in the employ of the Goldman store, from which the property was taken, he should be charged only, if at all, with being an aider and abettor to an embezzler or embezzlers.

The fact that he might conceivably be so charged does not relieve him of guilt of grand larceny. The larceny was shown to have been committed by him, regardless of the culpable conduct of others.

No error prejudicial to the defendant appearing in the record, the judgment will be affirmed.

SHERER, P. J. and KERNS, J. concur.

Appendix No. 6

THE SUPREME COURT OF THE STATE OF OHIO

No. 72-306

THE STATE OF OHIO,

City of Columbus.

State of Ohio,

Appellee,

vs.

LAWRENCE A. RIDGEWAY,

Appellant.

1972 TERM

To wit: June 9, 1972

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS

for MONTGOMERY *County*

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by William J. Abraham.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this_____day of_____19____

_____Clerk

_____Deputy

Appendix No. 7

THE SUPREME COURT OF THE STATE OF OHIO

No. 72-306

THE STATE OF OHIO,

City of Columbus.

State of Ohio,

Appellee,

vs.

LAWRENCE A. RIDGEWAY,

Appellant.

1972 TERM

To wit: June 29, 1972

REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No._____Page_____

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 29th day of June, 1972.

THOMAS L. STARTZMAN, *Clerk.*

By_____Deputy.